

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

APR 20 2017

JAMES W. McCORMACK, CLERK
By: *[Signature]* DEP CLERK

LEDELL LEE

PETITIONER

v.

No. 5:01-cv-377-DPM

**WENDY KELLEY, Director,
Arkansas Department of Correction**

RESPONDENT

ORDER

Lee has filed a new motion, *No. 186*, for release of evidence for DNA testing and a stay of execution pursuant to *McFarland v. Scott*, 512 U.S. 849 (1994). Kelley has, as requested, filed an expedited response, *No. 193*. The new motion, which aims at getting a pair of tennis shoes and hair samples for this testing, is of a piece with Lee's earlier motion for ancillary services. The core issue is whether Lee's entitled to another round of *habeas* review. This Court has transferred Lee's motion seeking that relief – albeit under the flag of Federal Rule of Civil Procedure 60(b) – to the Court of Appeals, because that is the only Court empowered by statute to decide the core issue. 28 U.S.C. § 2244(b)(3)(A); *No. 188*. The Court of Appeals has docketed the matter as case No. 17-1838, and that Court is probably the only one with jurisdiction, at this point, to decide dependent collateral matters such as the DNA testing. 28 U.S.C. § 2251(a)(1) & (2). Even if this Court is wrong about its jurisdiction

in the circumstances, a proper respect for the Court of Appeals' primary task, as well as common sense, suggests that this latest motion belongs, at least for the time being, in that Court, too.

Motion, *No* 186, transferred to the United States Court of Appeals for the Eighth Circuit immediately.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

20 April 2017